



Comptroller General
of the United States

247223

Washington, D.C. 20548

Decision

Matter of: Advanced Environmental Technology Corporation
File: B-259252
Date: March 20, 1995

Dennis J. Riley, Esq., and Joseph G. Billings, Esq., Riley & Artabane, for the protester.
Shawn Lavery DeJames, Esq., for Laidlaw Environmental Services, Inc., an interested party.
Robin Walters, Esq., Defense Logistics Agency, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation provided that agency would evaluate offerors' past performance based on evidence of successful performance of contracts similar in nature in terms of four complexity factors--waste quantities, variety of pickup locations and waste streams, and disposal time frames--agency reasonably determined that proposal from offeror who had successfully performed contract involving all four complexity factors was a better value, despite its higher cost, than was the proposal from the protester, who had no record of performing a contract involving all four complexity factors.

2. Agency was not required to hold discussions regarding complexity of contracts listed in protester's technical proposal, since agencies are not required to point out elements of proposals that receive less than full evaluation credit where, as here, the protester's past performance was essentially satisfactory and its proposal was found acceptable.

DECISION

Advanced Environmental Technology Corporation (AETC) protests the award of a contract to Laidlaw Environmental Services, Inc. under request for proposals (RFP) No. SP4400-94-R-0055, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Service (DRMS), for hazardous waste removal. AETC contends that DRMS unreasonably evaluated its proposal and that the

solicitation did not provide any basis for making an award to Laidlaw at a higher price.

We deny the protest.

BACKGROUND

On November 2, 1993, the agency issued a solicitation for the award of a fixed-price requirements contract for an 18-month base period with a 1-year option period, for removal and disposal of hazardous waste from military facilities in the states of New Hampshire and Maine. Solicitation paragraph M.10, Evaluation Factors for Award, provided that price was the most important evaluation factor, with past performance a significant, "somewhat lesser factor of importance." Paragraph M.10 also stated that award would be made to the offeror whose offer was "technically acceptable, conforms to the solicitation, and demonstrates the best value to the [g]overnment in terms of price and past performance."

Paragraph M.10(e) of the solicitation, advised offerors as follows:

"(1) The [g]overnment will evaluate the quality of the offeror's past performance. The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical proposals.

"(2) In investigating an offeror's past performance, the [g]overnment will consider information in the offeror's proposal and information obtained from other sources, including past and present customers and their employees; other government agencies, including state and local agencies; consumer protection organizations and better business bureaus; former subcontractors; and others who may have useful information. Failure by the offeror to provide evidence of performance on contracts of a similar nature in terms of waste quantities, variety of pick-up locations and waste streams, and disposal time frames, will be considered by DRMS in the offeror's past performance evaluation for this RFP.

"(3) Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The [g]overnment is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services. This is a matter of judgment. Offerors will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response--or lack thereof--will be taken into consideration.

"(4) Past performance will not be scored, but the [g]overnment's conclusions about overall quality of the offeror's past performance will be a factor in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the [g]overnment.

"(5) By past performance, the [g]overnment means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer. DRMS will also consider an offeror's performance on same or similar contracts in terms of waste quantities, variety of pick-up locations and waste streams, and disposal timeframes."

Paragraph L.53 of the solicitation instructed offerors on the discussion of past performance in their proposals as follows:

¹This clause, used in DRMS solicitations, is essentially identical to the clause used by other DLA commands (see, e.g., Centre Mfg. Co., Inc., B-251665, Apr. 21, 1993, 93-1 CPD ¶ 340), except for the final sentences in subparagraphs 3 and 5, providing for consideration of whether past performance involved similar waste quantities, variety of pickup locations, waste streams, and time frames. This additional language was drafted to meet the particular needs of DRMS here.

"(a) The offeror is required to provide any information regarding the level of performance, in terms of delivery and quality achieved under either [g]overnment or commercial awards for the same or similar services within the last [2] years. . . . [I]f performance deficiencies were identified, what were they and what corrective action was taken[?]"

The agency received 14 proposals on December 2, 1993, 5 of which were included in the competitive range. The agency then proceeded to hold discussions with these five offerors; DRMS afforded Laidlaw and AETC, as well as other offerors, the opportunity to elaborate upon certain violations of environmental laws and regulations which they had disclosed in their proposals.²

The five offerors submitted best and final offers (BAFO) on May 27, 1994; the lowest price was offered by General Chemical Corporation (GCC), whose past performance was rated acceptable. Laidlaw was second low in price, and AETC was fourth; of the five offerors, only Laidlaw, with a "good" rating, received a past performance rating higher than "acceptable." On June 23, based on GCC's low price, which was roughly 60 percent of Laidlaw's second low price, the agency awarded a contract to GCC; on October 13, DRMS terminated GCC's contract due to performance problems and initiated action to obtain the terminated services from another firm.

DRMS decided to seek new BAFOs from the other four offerors who had been in the competitive range under RFP No. SP4400-94-R-0055. On October 14, DRMS contacted the four offerors and issued an amendment to the RFP requesting submission of new BAFOs by October 18; the amendment also added a new contract line item number (CLIN) 9407XX, for removal of 220,000 pounds of bulk solid waste. CLIN 9407XX represented a new and urgent requirement, for the emergency disposal of building debris contaminated with lead and asbestos from the Naval Air Station in Brunswick, Maine. The agency advised offerors that, apart from price, they would be bound by their earlier submissions and certifications, including their technical proposal. All four offerors submitted new price proposals, acknowledging the RFP amendment, on October 18.

²For example, where an offeror had delivered hazardous waste to a facility whose storage and recordkeeping were later found deficient, the firm was assessed a penalty to finance the cleanup effort. The record also contains several instances where offerors paid fines for incorrectly completing forms.

AETC submitted the low offer for the revised solicitation. For CLIN 9407XX, AETC's price was substantially lower than those of the other offerors--\$24,200, or 11 cents per pound, as compared with Laidlaw's second low bid of \$107,800, or 49 cents per pound. At the same time, AETC had reduced its price for the remaining CLINS; where AETC had bid \$987,353.75 for all CLINS in May, it had submitted a total price of \$768,692.75, including the new CLIN 9407XX, in response to the October BAFO request. Laidlaw's total price was \$878,679.

In recommending award to Laidlaw, the contracting officer cited Laidlaw's higher technical rating and noted that, apart from CLIN 9407XX, Laidlaw's price was only 3.5 percent higher than AETC's. The source selection authority (SSA) expressed no doubts concerning the realism of AETC's price but decided that Laidlaw's superior past performance justified the 14.3 percent difference in price.¹ The SSA selected Laidlaw for award on October 21, and this protest followed.

PAST PERFORMANCE EVALUATION

AETC contends that paragraph M.10(e) of the solicitation failed to advise offerors that, as the protester asserts, the agency would give more weight to the complexity factors--waste quantities, variety of pickup locations⁴ and waste streams, and disposal time frames--than to the other factors listed in subparagraph 5. The protester contends that while paragraph M.10(e) indicated that customer satisfaction--i.e., conformance to specifications and

¹AETC initially contended that by effectively eliminating CLIN 9407XX from the price evaluation, the contracting officer failed to follow the evaluation criteria established by the solicitation. AETC subsequently conceded that the contracting officer's recommendation had no effect on the SSA's decision. The agency acknowledges that although it issued the solicitation for a requirements contract, the 220,000 pounds of waste in CLIN 9407XX represented a known quantity, and there was no basis for finding AETC's price for this CLIN either unbalanced or unrealistic.

⁴The agency considered a variety of pickup locations, rather than multiple pickups at one location, as a measure of complexity because a contractor would have to deal with separate state regulations and separate service regulations as well as local regulations. The statement of work here included 63 different pickup locations, involving all major services as well as Coast Guard and reserve facilities, in the two states.

standards of good workmanship, adherence to schedules, reputation for reasonable and cooperative behavior, commitment to customer satisfaction, and businesslike concern for the customer--would be of equal importance with contract complexity, the agency actually gave overwhelming weight to the complexity factors.

Agencies must advise potential offerors of the broad scheme to be employed in the evaluation as well as provide reasonably definite information concerning the relative importance of the factors to be considered. The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(2)(A) (Supp. V 1993), specifically requires Department of Defense agencies to advise potential offerors of all significant evaluation factors and their relative importance. Talon Mfg. Co., Inc., B-257536, Oct. 14, 1994, 94-2 CPD ¶ 140; Information Spectrum, Inc., B-256609.3; B-256609.5, Sept. 1, 1994, 94-2 CPD ¶ 251. The aim is to give offerors sufficient detail to structure their proposals to emphasize those factors--quality or price--most significant to the agency, and thus to be able to compete intelligently and on a common basis. C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279. The record here contains no evidence that the agency misapplied or misled offerors about the significant factors to be employed in its selection decision.

The record shows that the agency did consider those factors associated with "concern for the interest of the customer" and found no essential difference between Laidlaw and AETC. At a hearing held in connection with the protest, agency personnel stated that the references supplied by AETC were generous in their praise, and the agency accepted this favorable assessment by AETC's customers. However, Laidlaw's record of customer satisfaction appeared equally good, and it was not found necessary to contact all of Laidlaw's references to verify this assessment since the awardee had a long history of successful performance for the agency.

Contract complexity was an additional consideration applied apart from customer satisfaction, and the evaluators concluded that there was a significant distinction in the types of contracts performed by the two offerors. Laidlaw had demonstrated commitment to customer satisfaction while performing contracts as complex as the instant statement of work, while the evaluators found that AETC had not. By way of elaboration, DRMS notes that the evaluators found other offerors who had performed on complex contracts, but their records of customer satisfaction caused concern; these offerors received the same "acceptable" rating as AETC. In other words, the agency explains, "acceptable" offerors satisfied one of the two criteria--either complexity of

contracts or customer satisfaction; only Laidlaw satisfied both and only Laidlaw received a rating of "good."

The record shows that after receipt of the May 1994 BAFOs, the agency began by identifying 21 Laidlaw contracts "similar to this requirement in terms of quantities, variety of waste streams, variety of pickup locations, and removal and disposal timeframes." Based on its initial determination that the contracts were similar, the agency essentially concentrated on reviewing quality of performance.⁵ At the hearing, our Office questioned whether, in fact, Laidlaw had performed 21 contracts of equal complexity, and the data provided by the agency shows several contracts that do not appear "equal," at least in the terms suggested by the agency; nevertheless, the record shows that Laidlaw has performed at least 10 contracts with equal complexity factors. We therefore conclude that the agency reasonably found that Laidlaw satisfied both of the past performance criteria, demonstrating a concern with customer satisfaction while performing on complex contracts.

With respect to AETC, the agency looked at eight contracts identified by AETC in its technical proposal. None of the contracts involved all four complexity factors; seven were not comparable in terms of pickup sites.⁶ While AETC had demonstrated a record of successful performance on contracts with one or more complexity factors, it did not--as Laidlaw did--demonstrate in its technical proposal that it had successfully performed a contract involving all four complexity factors.

In response to the agency report on this protest, AETC provided a list of three contracts referenced in its proposal--contracts with American Cyanamid, Ciba Geigy, and Merck & Company--involving a variety of pickup locations that, AETC argues, satisfied the criteria for variety of pickup locations. The record shows that the agency contacted Merck but that Merck indicated that its contract with AETC did not meet the criteria for variety of pickup locations. The agency did not contact the other two

⁵The record shows that the references generally indicated no performance problems; of contracts where problems were noted, several appeared attributable to agency error. No more than two or three problems attributable to Laidlaw were reported, all of which had been corrected, and none of which were repeated.

⁶The contract comparable in number of pickup locations involved a much longer time frame, 90 days. In the agency's view, such a longer time frame for pickup usually involves similar material and provides more time for staging.

references supplied by AETC; the record is unclear why they were not contacted.⁷ There is, however, no legal requirement that all references listed in a proposal be checked. Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. Moreover, the references contacted were sufficient to demonstrate AETC's good performance record and resulted in a rating of "acceptable;" further, as the agency asserts, even the information supplied by AETC in the course of the protest was insufficient to show that the two contracts were similar to the instant effort in variety of waste streams and time frames. As a result, based on our review of the record, we find the evaluations of AETC and Laidlaw reasonable and consistent with the criteria listed in the solicitation.

AWARD DECISION

AETC contends that the selection of Laidlaw was inconsistent with paragraph M.10(e)(1) and (4) of the RFP, which AETC argues, allowed the agency to consider past performance differences only where an offeror demonstrated "exceptional" performance. AETC asserts that Laidlaw's "good" rating fell below this "exceptional" standard; further, the protester argues that the assignment of adjectival ratings to the technical proposals conflicts with the commitment not to "score" proposals.

In reviewing protests against an agency's selection decision, we review the record to determine whether the agency's judgments were reasonable and in accordance with the listed criteria and whether there were any violations of procurement statutes or regulations. CTA, Inc., B-244475.2, Oct. 23, 1991, 91-2 CPD ¶ 360. Here, we have no basis to conclude that the rating scheme and the selection decision were inconsistent with the solicitation language.

We agree with the agency that paragraph M.10(e)(1) merely provides an example of a situation where past performance may be determinative despite an offeror's higher price; the initial "[t]hus" and the phrase "may receive" clearly reflect a hypothetical situation used to illustrate the

⁷The contract specialist testified that it is his normal practice to attempt to verify references five or more times if necessary; in the instant case, the contract specialist was called to active duty military service during the evaluation phase, and there is no record of how many times he tried to contact AETC's references.

solicitation language.⁸ Further, as DRMS points out, its selection guidelines do not provide for an "exceptional" rating; the adjectival categories for acceptable proposals are "acceptable," "good," and "superior."

Nor do we view the statement that the agency would not "score" proposals as an indication that the agency would not rate proposals; rather, it indicates only that it would not use mathematical scoring. Subparagraph (3) expressly advises offerors that the evaluation will be a "subjective" assessment, and clearly indicates that the agency will distinguish among the quality of proposals in some manner. Our chief concern in this regard is whether the rating scheme provided the SSA a reasonable method for discerning the strengths and weaknesses perceived by evaluators and a reasonable method for recognizing the advantages and disadvantages of award to one offeror as opposed to another. Jones Operations & Management Co., B-248432.2, Oct. 16, 1992, 92-2 CPD ¶ 335. The rating scheme used here by DRMS met this standard.

To the extent that AETC challenges the agency's price/past performance tradeoff, we find nothing to indicate that the agency departed from the evaluation and selection criteria for which the solicitation provided. Such trade-offs are permitted provided they are rational and consistent with the stated evaluation criteria. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Here, the contracting officer determined that Laidlaw's record of successful performance of similar contracts outweighed its higher price and therefore presented the best value to the government. We see nothing unreasonable about that determination, and it is consistent with the evaluation criteria. See Corvac, Inc., B-254757, Jan. 11, 1994, 94-1 CPD ¶ 14.

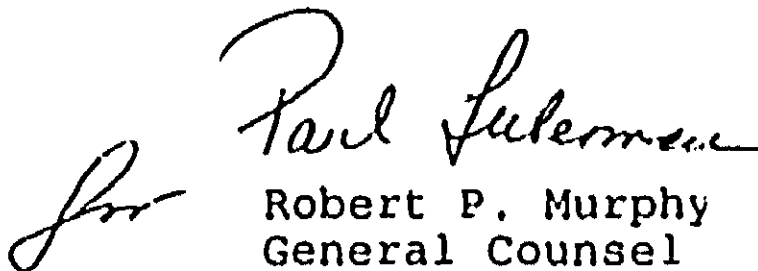
At AETC's debriefing, held 1 week after award, DRMS personnel indicated that AETC's technical proposal would have benefitted from "more detail." AETC argues that, if there was insufficient detail in its proposal to demonstrate its performance on contracts of similar complexity, the agency improperly neglected to discuss the issue with the protester in the 10 months that passed between the submission of initial proposals and the award to Laidlaw.

⁸As noted above, the sentence in issue provides as follows:

"Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical proposals."

Agencies are required to conduct meaningful discussions with the offerors in the competitive range; this means that contracting officials must advise offerors of deficiencies in their proposals and afford offerors an opportunity to submit revised proposals that satisfy the government's requirements. Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306. However, the agency is not obligated to discuss every aspect of an acceptable proposal that receives less than the maximum score. Johnson Controls World Servs. Inc., B-257431; B-257431.5, Oct. 5, 1994, 94-2 CPD ¶ 222. Here, the record shows that the agency conducted extensive discussions to allow AETC successfully to dispel any adverse inference arising from the minor performance violations that it was required to report in its technical proposal. It was not until AETC reduced its price in the second round of BAFOs that its past performance rating, as compared with Laidlaw's, became the determinative factor for selection. Since the reports on AETC were uniformly positive and its proposal was found acceptable, we have no basis to conclude that the agency unreasonably failed to discuss the issue with AETC. Id.

The protest is denied.


 Robert P. Murphy
 General Counsel